



**THE ATTORNEY GENERAL  
OF TEXAS**

**JIM MATTOX  
ATTORNEY GENERAL**

June 13, 1989

Mr. Lloyd Garza  
City Attorney  
City of San Antonio  
P. O. Box 9066  
San Antonio, Texas 78285

Dear Mr. Garza:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 6073; this decision is OR89-179.

Under the Open Records Act, all information held by governmental bodies is open unless the information falls within one of the act's specific exceptions to disclosure. The act places on the custodian of records the burden of proving that records are excepted from public disclosure. If a governmental body fails to claim an exception, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). The act does not require this office to raise and consider exceptions that you have not raised.

The City of San Antonio received an open records request for the report of an "informal investigation" the city conducted as the result of a city employee's complaint of sexual harassment against her supervisor. You contend that subsections 3(a)(3), 3(a)(8), and 3(a)(11) of the Open Records Act protects this report from required public disclosure.

Section 3(a)(3) of the Open Records Act, known as the "litigation" exception, excepts from required public disclosure information relating to pending or reasonably anticipated litigation. To secure the protection of section 3(a)(3), a governmental body must first demonstrate that a judicial or quasi-judicial proceeding is pending or reasonably anticipated. Open Records Decision No. 452 (1986). Because the charges of sexual discrimination are currently before the Equal Employment Opportunity

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Commission, this first test has been met. The term "litigation" includes contested administrative proceedings.

The governmental body's attorney must also show, however, that the requested material relates to the litigation such that disclosure of the material would adversely affect the governmental body's litigation interests. Open Records Decision No. 493 (1988); see Open Records Decision No. 323 (1982). You have not demonstrated that the requested information meets this second test; consequently, unless you submit to this office, within ten days of receipt of this letter, additional information as to why the report meets this test, you may not withhold this information pursuant to section 3(a)(3).

Additionally, we note that much of the information contained in the investigation report has previously been released to the requestor/complainant, either orally or in other reports made by the city's EEOC counselor. This office has held that no section 3(a)(3) interest exists with respect to information already obtained by all parties to the litigation. Open Records Decision No. 349 (1982). If the requestor has seen any of the information in the internal investigation report, there would be no justification for withholding that information from the requestor pursuant to section 3(a)(3).

Section 3(a)(11) of the act excepts inter-agency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's deliberative process. Open Records Decision No. 464 (1987). Section 3(a)(11) does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 450 (1986). Only that portion of the report with the heading "Findings and Recommendations" is protected from public disclosure by section 3(a)(11).

Section 3(a)(8), known as the "law enforcement" exception, excepts from required public disclosure information pertaining to the prevention, detection, and prosecution of crime. You state that allegations of illicit drug use by city employees have been forwarded to law enforcement personnel and that the information pertaining to those allegations is therefore protected from public disclosure by section 3(a)(8).

Section 3(a)(8) applies to particular records where their release would "unduly interfere" with law enforcement

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or prosecution. Open Records Decision No. 434 (1986). One of the purposes of the exception is to protect law enforcement and crime prevention efforts by preventing suspects and criminals from using records in evading detection and capture. See Open Records Decision No. 133 (1976). Whether disclosure of particular records will unduly interfere with crime prevention must be decided on a case-by-case basis. Attorney General Opinion MW-381 (1981).

You have not demonstrated, nor is it apparent to this office, how the release of the report would hamper the criminal investigation, especially given the fact that both the complainant and her supervisor of whom she complains are aware of the allegations each has made against the other. You may not withhold any of the requested information pursuant to section 3(a)(8).

Finally, although the attorney general will not ordinarily raise an exception that might apply but that the governmental body has failed to claim, see Open Records Decision No. 455 (1987), we will raise section 3(a)(1) because the release of confidential information could impair the rights of third parties and because its improper release constitutes a misdemeanor. See V.T.C.S. art. 6252-17a, § 10(e). Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision."

Section 19A of article 4413(29cc), V.T.C.S., which governs the release of polygraph examinations, reads in pertinent part:

(c) A licensed polygraph examiner, licensed trainee, or employee of a licensed polygraph examiner may disclose information acquired from a polygraph examination to:

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the person . . . or governmental agency that requested the examination;

(3) members or their agents of governmental agencies such as federal, state, county, or municipal agencies that license, supervise, or control the activities of polygraph examiners;

(4) other polygraph examiners in private consultation, all of whom will adhere to this section; or

(5) others as may be required by due process of law.

(d) A person for whom a polygraph examination is conducted or an employee of the person may disclose information acquired from the examination to a person described by Subdivisions (1) through (5) of Subsection (c) of this section.

(e) The board or any other governmental agency that acquires information from a polygraph examination under Subdivision (3) of Subsection (c) of this section shall keep the information confidential.

Consequently, the department is barred by statute from releasing the results of the polygraph examination discussed in the report to the requestor. See also Open Records Decision No. 430 (1985).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR89-179.

Yours very truly,

*Open Government Section*  
*of the Opinion Committee*

Open Government Section  
of the Opinion Committee  
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JSR/RWP/bc

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